(8th Cir. 1994), citing *Semler v. Psychiatric Institute of Washington, D.C., Inc.*, 575 F.2d 922, 927-28 (D.C. Cir. 1978) (requiring "a federal court exercising diversity jurisdiction in forum II to give the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I."); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974) (holding that federal court proceedings must be given by state courts the same full faith and credit due the judicial proceedings of another state).

The Court of Appeals' decision is consistent with the current view of the Full Faith and Credit Clause as expressed by this Court in *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). *Baker* reiterated the long-standing principle that as long as a court has adjudicatory authority over the subject matter and persons governed by a judgment, the Full Faith and Credit Clause demands that the judgment "qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force." *Baker*, 522 U.S. at 233. *Baker* relied upon the very purpose of the Full Faith and Credit Clause to "alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Baker*, 522 U.S. at 232 (citing *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

Not only did *Baker* reiterate the basic principles of the Full Faith and Credit Clause, but it did so in the context of

a judgment based on state public policy. The Supreme Court drew a crucial distinction between a court's decision to utilize a particular state's law based on public policy, and the credit owed to a judgment rendered pursuant to that public policy by the courts of that state in the other forty-nine states. While "a court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy . . . our decisions support no roving 'public policy exception' to the full faith and credit due judgments." *Baker*, 522 U.S. at 233. As *Baker* pointed out, even judgments completely repugnant to a state's public policy must be recognized under Full Faith and Credit. *See Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (judgment of a Missouri court entitled to full faith and credit in Mississippi even though Missouri judgment rested on a misapprehension of Mississippi law); *see also*, *Marina Associates v. Barton*, 563 N.E.2d 1110 (1990) (Illinois must recognize judgment obtained in New Jersey for gambling debt); *Valley Nat'l Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997) (a federal court cannot refuse based on federal public policy to enforce a validly entered state judgment); *Bryant v. Shields, Britton & Fraser*, 930 S.W.2d 836, 840 (Tex. App. 1996) (a court must extend full faith and credit to a valid judgment from another state regardless of the forum state's public policy); *Int'l Recovery Sys., Inc. v. Gabler*, 527 N.W.2d 20, 22 (Mich. Ct. App. 1994) (Nevada judgment for gambling debt enforceable in Michigan despite the fact that enforcement of gambling debts is contrary to Michigan's public policy); *Clark v. Rockwell*, 435 S.E.2d 664, 667 (W. Va. 1993) (noting that states cannot deny full faith and credit based on public policy considerations); *Speyer v. Cont'l Sports Cars, Inc.*, 518 N.E.2d 39, 42 (Ohio Ct. App. 1986) (holding that "[a] valid judgment rendered in Texas will be recognized and

enforced in Ohio even though the strong public policy of Ohio would have precluded recovery in its courts on the original claim").

While this Court has recognized a Fourteenth Amendment limitation on a state court's choice of law in a contract case, *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914), the limitation does not apply to the Georgia choice of law rule in this case wherein one of the parties to the contract was a bona fide resident of the State of Georgia when the action was commenced and the other party transacted business in Georgia and admitted jurisdiction. Here, the question is not whether a non-resident can ask a Georgia court to reach out and enforce Georgia law in another state. Instead, the issue is whether Respondent Meathe, a Georgia resident, can seek a Georgia court's protection when a corporation seeks to enforce a contract in Georgia that is unenforceable under Georgia law and public policy.

> This Court's decision in *Pacific Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940, clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy.

Nevada v. Hall, 440 U.S. 410, 421-22 (1978); *see also Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (citing *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914) but holding that California could enforce its own public policy in California, as opposed to enforcing Alaska's laws).

3. The decision below – that the ruling of a district court in a diversity action in which the parties are subject to the court's jurisdiction is claim and issue preclusive – does not create a "perverse regime in which any employee can achieve nationwide invalidation of a non-solicitation agreement."

There is nothing perverse about Georgia's rule of law, based on its constitutional provision, that it will not "blue pencil"[3] overly broad and, thus, invalid restrictive covenants that are ancillary to employment. "It is a part of the public policy of [Georgia] to suppress monopolies and to encourage competition, and to this end restrictions on the right of any person, firm, or corporation to engage in its business and to do business with those members of the public who choose to partake of its services are not favored. [1983 Ga. Const. Art. III, Sec VI, Par. V; O.C.G.A. § 13-8-2]." *Troup County Electric Membership Corp. v. Georgia Power Co.*, 191 S.E.2d 33, 36 (Ga. 1972).

As previously noted, the Georgia law has no nationwide application and its courts do not enjoy nationwide jurisdiction. The jurisdiction of the courts sitting in Georgia, as well as the other states, is limited by due process. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Petitioner's three putative reasons for stating that the Court of Appeals' decision is perverse have no merit. (Pet. 12-18).

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[3] The Georgia courts define "blue pencil" as "judicial editing of covenants which were not written in such a way that they are divisible by simply excising certain parts or words from them." *White v. Fletcher/Mayo/Assocs., Inc.*, 303 S.E.2d 746, 748 n. 1 (Ga. 1983).

The fact that our federal system allows a state to serve as a laboratory for social and economic experiments does not undermine the necessity of issue and claim preclusion.

Petitioner has failed to produce any evidence that the Court of Appeals' decision has the potential to deprive U.S. employers of the economic benefits of non-solicitation agreements.

Petitioner's third reason offered to support its contention that the Court of Appeals decision "will have a perverse effect on the administration of justice nationwide" (Pet. 15) fails to take into account the perverse effect of allowing the Petitioner to re-litigate issues and claims in other courts that it first litigated in the United States District Court for the Southern District of Georgia. The burden and confusion of allowing a party to relitigate the same claim against the same party in another forum are clear.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

MARSH & MCLELLAN COMPANIES, INC.,

Petitioner,

v.

PALMER & CAY, INC. AND JAMES B. MEATHE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America (the "Chamber") hereby moves pursuant to Supreme Court Rule 37.2(b) for leave to file the attached *amicus curiae* brief in support of Marsh & McLennan's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. *Amicus* is filing this motion because consent to the filing of this brief was granted by counsel for Petitioner but denied by counsel for Respondents.

The Chamber is the Nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. Because rules of law that place appropriate limits on the territorial boundaries of state sovereignty and promote respect for the validity and enforceability of contracts are of great importance to the business community, the Chamber regularly files *amicus* briefs in cases that threaten the orderly formation and regulation of commercial agreements in interstate commerce.

The Eleventh Circuit's decision (1) applies Georgia law to void an otherwise valid non-compete agreement that was formed outside of Georgia and intended to have nationwide application; and (2) imposes Georgia's public policy choice on Georgia's 49 sister States, all or virtually all of which would otherwise recognize and fully enforce the non-compete agreement. *Amicus* is concerned that the Eleventh Circuit's decision threatens the integrity and orderly judicial administration of contracts involving interstate commerce by ignoring (1) the clear conflicts presented between nationwide application of the substantive law of Georgia and fundamental principles of state sovereignty and comity; and

(2) the well-established limitations that the Commerce Clause imposes on a State's ability to project its authority extraterritorially. *Amicus* is uniquely positioned to assist the Court in this case because its members routinely enter into nationwide commercial agreements, and the Chamber has a fundamental interest in the enforcement of federal constitutional principles that promote certainty and predictability in contract formation and prevent any one State from imposing its public policy agenda on the rest of the Nation.

Accordingly, the Chamber respectfully requests that the Court grant leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the Nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. The members of the Chamber routinely enter into contracts involving interstate commerce and have a fundamental interest in the enforcement of federal constitutional principles that promote certainty and predictability in contract formation and prevent one State from imposing its public policy agenda on the rest of the Nation. Accordingly, the Chamber regularly files *amicus* briefs in cases that implicate the conduct of interstate commerce and the orderly administration of justice in our federal system.

Through the decision below, and in the absence of any claim that there was a defect in contract formation, Respondents successfully appropriated Georgia law to void a non-compete agreement that was entered into outside of Georgia, that was intended to have nationwide effect, and that is recognized as both valid and enforceable in virtually every State in the Union. Sitting in diversity, the Eleventh Circuit voided the agreement nationwide, endorsing a rule of law that encourages States to outflank one another in an effort to exert nationwide control over contested questions of public law and policy, thus wreaking havoc upon the ability of parties to define their rights and obligations in contracts involving interstate commerce.

1. A motion for leave to file this amicus *curiae* brief is attached hereto. Pursuant to Supreme Court Rule 37.6, *amicus curiae* declares that no counsel for any party to this case authored this brief in whole or in part and that no entity or person, other than *amicus* the Chamber, its members, and its counsel, made any monetary contribution to the preparation or submission of this brief.

By endorsing Respondents' stratagem, the Eleventh Circuit ignored the clear teachings of at least two lines of Supreme Court precedent. First, by mechanically invoking the *Erie* doctrine to accord a *sui generis* Georgia rule nationwide effect, the Eleventh Circuit violated the fundamental principle that, in a federal system composed of a national government and fifty independent, subordinate sovereigns, the judicial process cannot be subverted to permit one State to impose its will on the entire country. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Second, whatever power the State of Georgia may have to regulate contracts formed within its borders, a rule of decision that permits the application of Georgia law to void a contract formed out-of-state and intended to govern the parties' conduct nationwide plainly imposes an unconstitutional burden on interstate commerce. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337-39 (1989).

For the reasons set forth below, *amicus* respectfully urges this Court to grant certiorari to reinforce these principles and correct the Eleventh Circuit's erroneous assumption that a federal court sitting in diversity is required to apply State rules of decision even where application of those rules transgresses clear constitutional limitations on the capacity of a State to interfere with commercial relationships beyond the State's borders.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because The Eleventh Circuit's Extraterritorial Extension Of Georgia Law Fundamentally Undermines The Stability And Comity Essential To The Formation And Enforcement Of Contracts Involving Interstate Commerce.

This case addresses the limits that the Constitution places on the power of a single State to apply its law, acting through its own judiciary or through the federal judiciary sitting in diversity, to (1) void a contract involving interstate commerce in the absence of any alleged defect in contract formation; and (2) project the force of its ruling nationwide. The essential facts, more fully set forth in the Petition, are as follows. Respondent James Meathe was employed by Petitioner Marsh & McLennan ("Marsh"), a national and international insurance brokerage company, from 1997 to 2003 following Marsh's acquisition of Meathe's former employer Johnson & Higgins. In connection with his employment by Marsh, Meathe signed a "client and employee non-solicitation agreement" in 2002 in exchange for the right to exercise certain Marsh stock options (the "2002 Agreement"). Pet. App. 5a. In relevant part, Meathe agreed under the 2002 Agreement "to be bound by customer and employee non-solicitation covenants set to expire two years after Meathe's last day of work at [Marsh]." *Id.*

Meathe left Marsh's employ in January 2003 and moved to Georgia to become President of Respondent Palmer & Cay, an insurance brokerage company and direct competitor of Marsh. *Id.* at 6a. Meathe and Palmer & Cay then sued Marsh in the U.S. District Court for the District of Georgia seeking to enjoin Marsh from enforcing the two-year non-solicitation provision. *Id.* at 7a.

The district court, sitting in diversity, began by applying Georgia's choice of law rules under the doctrine set forth in *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938). Noting that, under Georgia law, a court is constrained to "first apply Georgia law to determine if enforcement of a restrictive covenant offends the state's public policy," Pet. App. 31a, the district court held that the provisions of the 2002 Agreement that barred Meathe from "accepting business" from certain unsolicited Marsh clients violated Georgia's public policy. *Id.* at 42a-43a; *see, e.g., Waldeck v. Curtis 1000, Inc.*, 583 S.E.2d 266, 268 (Ga. Ct. App. 2003) (holding that "a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable").[2] Georgia stands out among the 50 States in its refusal to honor non-compete arguments similar to the one at issue.[3] In determining that the non-compete agreement was unenforceable, however, the district court properly limited

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2. The district court also applied Georgia's "'no blue-penciling' doctrine," which holds that "one flawed . . . [non-compete] provision" can "unravel" a non-compete agreement and invalidate the entire contract. Pet. App. 35.

3. As one commentator has observed, Georgia's hostility to non-compete agreements is second to none. *See* Christopher D. David, *When A Promise Is Not A Promise: Georgia's Law On Non-Compete Agreements, As Interpreted By The Eleventh Circuit In Keener v. Convergys Corporation, Gives Rise To Comity And Federalism Concerns*, 11 J. Intell. Prop. L. 395, 396 (Spring 2004) ("While some courts are fairly lenient and uphold most NCAs, others apply strict scrutiny to these covenants and refuse to enforce NCAs that do not fit their particular tastes. Of these restrictive jurisdictions, perhaps the most extreme are Georgia and California. Both states routinely strike down such covenants as unenforceable.") Though "California, unlike Georgia, expresses its policy against restraints on trade via statute and not constitution . . . the two states' policies against restraints on trade are similar in structure and effect." *Id.* at 405 n.64 (*comparing* Ga. Const. art. 3, § 6, ¶ V(c), with Cal. Bus. & Prof. Code § 16600 (West 1999)).